Supreme Court, U. S.
FILED
NOV 22 1978
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
October Term, 1978
No. 78-837

DANIEL FATICO, NICHOLAS COROZZO, LEONARD DE MARIA, KENNETH REESE, JAMES DELLARATTA and LOUIS SCIDA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 1978.

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TABLE OF CONTENTS

Page

Jurisdiction 1

Questions Presented 2

Statement of the Case 2

Reasons for Granting Writ 6

1. The District Court's Ruling As Affirmed By The Second Circuit Court Of Appeals Regarding The Non-Disclosure Of An Undercover FBI Agent Is In Direct Conflict With This Court's Decisions Regarding The Disclosure Of Witnesses 6

2. The Trial Court's Failure To Submit A Missing Witness Charge As Affirmed By The Court Of Appeals Is In Direct Conflict With This Court's Decisions Regarding Failure To Produce Witnesses Exclusively Within One Partie's Control. 9

Conclusion 11

Appendix—Order of Court of Appeals 1a

CASES CITED

Burgess v. United States, 440 F2d 226 (DC, Cir. 1970) . 10

Graves v. United States, 150 US 118, 121 (1893) 10

Roviaro v. United States, 353 U.S. 53 (1957) 6

United States v. Comulada, 340 F2d 449, 452, 2d Cir., cert. denied, 380 U.S. 978, 1965 10

STATUTE CITED

28 USC Section 1254(1) 2

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The petitioners respectfully request that a Writ of Certiorari issue to review the judgment Order, entered on October 24, 1978, by the United States Court of Appeals for the Second Circuit in this proceeding.

JURISDICTION

The judgments of conviction were entered against the petitioner De Maria and the co-petitioners on June 9, 1978. The judgments were affirmed on appeal to the

United States Court of Appeals for the Second Circuit by order entered October 24, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the Government have been directed to disclose the name of an undercover FBI agent, notwithstanding that said disclosure may have been tantamount to disclosure of a confidential informant, where said agent could confirm or deny the defendant's allegation at trial that critical testimony of another agent was perjured?

2. Under the facts of this case was the trial Courts failure to submit a missing witness charge upon defense counsel's request an abuse of discretion?

STATEMENT OF THE CASE

The petitioners were indicted and tried in the Eastern District of New York. Count One (1) of the indictment charged all defendants with unlawfully conducting an illegal gambling business involving five or more persons in its operation from on or about and between September 1, 1975 and December 12, 1975 in violation of Title 18, USC Sections 1955 and 2. Count Two of the indictment charged all defendants during the same period of time with conspiracy to violate Section 1955 in violation of Title 18, USC Section 371.

At the conclusion of the trial, all defendants were acquitted of the conspiracy count and convicted solely of violation of Sections 1955 and 2. On appeal, the Second Circuit affirmed the petitioners' convictions.

The Government's witnesses at trial were Special

Agents, Paul Brana, Richard Nalley, George D. Dyer, A. Robert Walsh, Thomas R. French, Joseph Daly and Richard T. Lind. Agent Lind testified as the Government's gambling expert. Agents Daly, French and Walsh testified to the circumstances surrounding the execution of a search warrant on December 12, 1975 for the premises 5002 Church Avenue and various named defendants. Agent Dyer testified to street surveillances of the premises on November 6th, 7th and December 8th, 9th, 10th, 1975 and to the execution of the warrant on December 12, 1975. Agent Nalley testified to street surveillances on September 17th, 18th, 19th, 25th, 26th, October 2nd, 3rd, 6th, 7th, 15th, 16th, 17th, 23rd and 24th, 1975. Agent Brana testified to various acts and statements made by the defendants within premises 5002 Church Avenue on September 252th, October 6th, 15th, 16th, 23rd and November 6, 1975. The following testimony was elicited by the above witnesses.

Special Agent Brana testified that on the above noted dates he appeared at the premises 5002 Church Avenue and participated in a crap game (34)[1] on each date. He arrived at about 11 to 11:45 P.M., and stayed approximately 1 hour 45 minutes to 2 hours and 15 minutes (35).

Brana testified that on each of the six (6) nights he participated in the game, he observed one or more of the defendants named in the indictment act as either a dealer

1. Numbers in parentheses refer to trial transcript. Premises 5002 Church Avenue was described as a two story brick structure having a street level entrance leading to stairs to the second floor where there are several doors, the last of which opened to a large room divided into two (2) rooms, one having a TV and chairs, the other containing a crap table, 3½ feet by 12 feet, covered with green felt. The premises is also known as the Churchonian Social Club. (35, 36, 37, 40, 200).

or stickman (49-52),[2] but never received chips from any of the defendants (114-119).

Although Brana testified that he never saw any of the defendants participate in the game as a player or gambler, he indicated he left prior to the end of the game. Moreover, he testified that a bet could be placed without touching the dice or putting money on the table and that he did not know whether any one of the six (6) defendants were making side bets on the night he was present (54, 77-80, 114).

On cross examination, defense counsel was precluded from inquiring of Brana who took him into the crap game. At that time both the Court and defense counsel were mislead by Agent Brana and the Government into believing that it was a confidential informant that allegedly introduced him into the game and disclosure of same would jeopardize his position (70-71).

Subsequent thereto, a recess was called at which time defense counsel informed the Court that it was their position that Brana's testimony was perjured and that infact he was never inside the premises 5002 Church Avenue on the dates he claimed. (125-127) Indeed, no where in the reports of any agent was there mention of a confidential informant entering with the agent and Assistant U.S. Attorney McCallion so stipulated (127-130, 143, 144, 196-197), nor were there any photographs of Brana or the informant entering. (172-173, 183)

At this time, Assistant U.S. Attorney Thomas Puccio (Chief of the Strike Force), who was otherwise not involved in the trial, appeared before Judge Weinstein and apparently after conversing with Agent Brana, informed the Court and defense counsel for the first time that it was not

2. A dealer is one who pays and collects the bets on the table, while a stick man is one who retrieves the dice with a stick and moves them from player to player. (45, 49).

a confidential informant that allegedly introduced Brana into the game, but rather another FBI Agent. (130-133). At this time the Court again called for the Government to supply it with information to be reviewed in camera.

Subsequent testimony established that on December 12, 1975, a search warrant was executed for premises 5002 Church Avenue and several named defendants. As a result of said search, a brown felt pad was recovered and lost, money taken from the defendants and several other items of evidence seized. (155-160) Agent Dyer searched the defendant DeMaria and found only a small amount of money on his person. (186, 196)

At the conclusion of the entire case, counsel moved for a dismissal for the Government's failure to disclose the agent. At said time defense counsel reiterated its position that Brana's testimony was perjured and in support of same referred the Court to the sworn affidavit of December 11, 1975 by Agent Nally in support of the December 12, 1975 search warrant, wherein there were extensive recitals of two confidential informants, but not one word of any undercover FBI Agents entering the premises. (276, see affidavit A-6)[3] The Court again ordered the Government to produce information for an in camera inspection. Counsel also requested that the Court charge that the witness in the Government's control and not produced would testify adversely. (272, 275-278) Both were denied by the Court.

Thereafter, the jury acquitted all defendants of the conspiracy charge. (390-394) Defendants motion to dismiss the substantive count on double jeopardy grounds was denied and the jury after further deliberation, convicted all defendants of the gambling count.

3. Numbers in parentheses preceded by the letter "A" refer to appendix to the Court of Appeals.

Subsequent to conviction, appellants moved pursuant to Rule 29 to set aside the conviction based upon Agent Brana's testimony at trial. Said motion was denied.

REASONS FOR GRANTING WRIT

1. THE DISTRICT COURT'S RULING AS AFFIRMED BY THE SECOND CIRCUIT COURT OF APPEALS REGARDING THE NON-DISCLOSURE OF AN UNDERCOVER FBI AGENT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS REGARDING THE DISCLOSURE OF WITNESSES.

It was the petitioners' contention at trial and thereafter in the Court of Appeals that their conviction was based upon the perjured testimony of Agent Paul Brana.

As mandated by the Sixth Amendment to the United States Constitution,

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . "

Notwithstanding the above, this Court has held in *Roviaro v. United States,* 353 U.S. 53 (1957) and its related case law that the Government has a privilege of refusing to disclose the identity of its informants at trial.

However, this privilege is qualified and where the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. *Roviaro,* supra page 60-61.

As noted in *Roviaro,* each case must be considered on its own merits, giving consideration to the crime charged, possible defenses, possible significance of the informers testimony and other relevant factors. *Roviaro* page 62. The petitioners contend that a conviction that could be and indeed was based upon perjured testimony is a relevant factor in determining disclosure and should be sufficient in and of itself to mandate said disclosure.

Notwithstanding the above, the District Court and The Court of Appeals made no finding with respect to the significance of the undisclosed agent's testimony, but was only concerned with potential harm to the confidential informant. Moreover as reflected by the opinion of the Court of Appeals, there was no finding that Brana's testimony was not perjured but rather that there was no justification for disclosure since the defendants could have called other witnesses to show Brana perjured himself.

Obviously, even if other witnesses were available to the petitioners, this cannot rectify the fact that the convictions were based upon perjured testimony.

This fact is clearly established in several ways:

1. The affidavit of Agent Richard A. Nalley made in support of the issuance of the search warrants herein and dated December 11, 1975 sets forth the fact that the information he received was from Agent Robert Walsh and Joseph Keating and from two confidential informants, one of whom gave information in ten other gambling investigations and the other one who is alleged to have been a gambler. At no point in this affidavit is there even an inkling that two undercover FBI Agents were involved. (A-6 to A-19, A80)

2. It was established at trial that there are no records in the possession of the FBI of monies given to Agent Brana for betting purposes and the testimony on Brana's winnings and/or losses was grossly inconsistent with the

testimony of the supervising agent, Nalley. This Court is well aware that in all instances the bookkeeping procedures of the FBI are flawless and had there been any monies given or received from Agent Brana through Agent Nalley, there would have been records to that effect, (A25-28, A35, A38-39, A45-50, A67-69, A74).

3. For "security reasons" there is not even one mention in the surveillance log of any Agent other than Brana's own records of his entering or leaving the social club. Not even an "u/c in" or a "u/c out" without mentioning any name. When before, even in narcotics or murder cases, has the Court been given such an excuse. (A60, A70-A71).

4. During the course of the trial it was revealed that numerous photographs were taken including the days when Agent Brana is alleged to have entered and left the social club yet there is not even one picture of Brana entering or leaving. (A70-A71, A72)

5. Agent Brana testified the color of the dice table was green (which is usually the color of dice tables) when in fact in this case the table was brown and is not available because same was "lost" by the FBI. (A20-A23, A61-A66)

6. Agent Brana's self-contradictory testimony with respect to the manner in which he allegedly gained entry into the premises, passing the alleged security guard at the entrance. (A40-A41)

7. Agent Brana's self-contradictory testimony with respect to whether the defendant DeMaria or any defendant gave him chips on any of the nights he was allegedly at the game. Brana first testified that the defendant De Maria paid him in chips and shortly thereafter denied that any defendant gave him chips. (A43-A48)

Although appellants are not privy to the sealed documentation submitted to Judge Weinstein, the Court of Appeals and presumably this Court, even if said documentation should establish the existence of the undercover FBI Agent, it cannot erase the fact that appellants' conviction was based on perjured testimony.

It is respectfully submitted that for this reason, disclosure was essential to a fair determination of petitioners' guilt on innocence as set forth in *Roviaro* and both the District Court and Second Circuits rulings were in direct conflict therewith.

2. THE TRIAL COURT'S FAILURE TO SUBMIT A MISSING WITNESS CHARGE AS AFFIRMED BY THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS REGARDING FAILURE TO PRODUCE WITNESSES EXCLUSIVELY WITHIN ONE PARTIE'S CONTROL.

At the conclusion of the entire case and prior to summation, defense counsel made the following request to charge:

> "Mr. Laifer: There was another one. Frankly, it's my fault. I should have put it in—your Honor several times during the course of the trial indicated that it would be chargeable against the defendant the fact that they did not produce the second agent, and undercover FBI agent in that you indicated that the defendants were put at a disadvantage by that.
>
> I would request that your Honor charge as to a witness in control of the Government and that he would testify adversely to what the first agent testified to."

Said request was denied by the Court (A77-A78) and instead, the Court instructed the jury that:

> "Also, absence of the names of the informants and one of the FBI agents might make it more difficult for them to try their case because they said they wanted to cross examine these people, but I reminded you of that already." 376

In *Graves v. United States,* 150 US 118, 121 (1893), this Court held that:

> "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption (inference) that the testimony, if produced, would be unfavorable." Also See *U.S. v. Di Re,* 332 US 581 593 (1948)

Although case law of the Second Circuit as affirmed by this Court, clearly holds that the jury need not draw the inference if it does not wish to (*U.S. v. Comulada,* 340 F2d 449, 452, 2d Cir., cert. denied, 380 U.S. 978, 1965), surely enlight of the facts and circumstances of this case, including but not limited to the acquittal of all appellants of the conspiracy charge and the allegations of perjury with respect to Agent Brana's testimony, the jury may well have found that the government's failure to disclose and produce the undercover FBI Agent was because he would give unfavorable testimony and not because of the alleged potential disclosure of the informant.

The Court, in charging as it did, usurp the jury's role and precluded the jury from considering a factor which unquestionably played a significant role in the jury's determination of guilt or innocence.

Moreover, research has revealed that this Court has not set forth any definitive ruling regarding the propriety of said charge and the circumstances that require its submission to the jury. See *Burgess v. United States,* 440 F2d 226 (DC, Cir. 1970) interpreting this Court's decision in Graves. By reason of the above, certiorari should be granted to give uniformity to the various circuits.

CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of October, one thousand nine hundred and seventy eight.

Present:

HON. WILFRED FEINBERG
HON. WILLIAM H. MULLIGAN
Circuit Judges

HON. GEORGE C. PRATT
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL FATICO, NICHOLAS COROZZO, LEONARD DE MARIA, KENNETH REESE, JAMES DELLARATTA, LOUIS SCIDA

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court.

A. DANIEL FUSARO,
Clerk

BY: ARTHUR HELLER,
Deputy Clerk